

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: March 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Biogena GmbH & Co.*  
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Application Serial No. 79285012  
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Jeffrey Goehring of Nixon & Vanderhye for Biogena GmbH & Co.

Kamal S. Bal, Trademark Examining Attorney, Law Office 119,  
Brett J. Golden, Managing Attorney.  
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Before Zervas, Bergsman, and Goodman,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Biogena GmbH & Co. (“Applicant”) seeks registration on the Principal Register of  
the mark 3-SALT ZINC (in standard characters) for the goods listed below:

Pharmaceutical and veterinary preparations, namely, nutraceuticals for use as a dietary supplement; sanitary preparations for medical purposes; dietetic food and substances adapted for medical and veterinary use, namely, dietetic foods for a balanced diet adapted for medical and veterinary use; starch for dietetic foods adapted for medical uses and pharmaceutical purposes; food for babies, namely, powdered milk for babies; dietary supplements for humans and animals for medical purposes, namely, antioxidant food supplements for humans and animals for medical purposes; nutritional supplements and dietetic food supplements adapted for medical uses for sports and performance enhancement;

meal replacement powders for sports and performance enhancement for medical use; mineral food supplements, consisting primarily of vitamin preparations, amino acids, mineral supplements and trace elements being mineral preparations, all adapted for medical purposes; vitamin preparations; dietetic preparations adapted for medical purposes, namely, for making medicated dietetic beverages; drinks for medical purposes, namely, herbal teas for medicinal purposes; medical plasters; surgical dressings; material for dental fillings and dental impressions; disinfectants; preparations for destroying noxious animals; fungicides, herbicides, in International Class 5.<sup>1</sup>

The Examining Attorney refused to register Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive because "[t]he wording '3-SALT ZINC' is descriptive of the ingredients found in applicant's goods which feature three different kinds of salts, namely, zinc salts."<sup>2</sup>

Citations to the briefs refer to TTABVUE, the Board's online docket system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, \*2 n.1 (TTAB 2020). Citations to the prosecution history refer to the USPTO Trademarks Status and Document Retrieval (TSDR) system by page number in the downloadable .pdf format.

## I. Applicable Law

Section 2(e)(1) of the Trademark Act precludes registration of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive

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<sup>1</sup> Serial No. 79285012 was filed on November 29, 2019, under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f, requesting an extension of protection of International Registration No. 1529471 registered on November 29, 2019.

<sup>2</sup> Examining Attorney's Brief (8 TTABVUE 4).

. . . of them.” 15 U.S.C. § 1052(e)(1). A term is merely descriptive within the meaning of the statute “if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); see also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).

We “must consider the mark as a whole and do so in the context of the goods or services at issue.” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017). “Whether consumers could guess what the product is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). Rather, “the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

This principle of analyzing the mark as a whole applies to word marks with multiple components as well.

In considering a mark as a whole, the Board may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components. . . . [I]f . . . portions individually are merely descriptive of an aspect of appellant’s goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.

*In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004).  
*Cf. In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999)  
(the USPTO must consider the mark in its entirety because the mark, as whole, may be greater than the sum of its parts).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *In re Fallon*, 2020 USPQ2d 11249, at \*7 (TTAB 2020) (quoting *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods.” *Id.*, at \*7-8 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (internal quotation omitted)). “Evidence that a term is merely descriptive similarly may come from an applicant’s own usage other than that found on its labels, packaging or advertising materials.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at \*4 (TTAB 2019).

## II. Facts

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016) defines “Salt” as, inter alia, “[a]n ionic chemical compound formed by replacing all or part of the hydrogen ions of an acid with metal ions or other cations.”<sup>3</sup>

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<sup>3</sup> May 21, 2020 Office Action (TSDR 7) (YourDictionary.com). *See also* “Salt (chemistry),” Wikipedia.org attached to the December 15, 2020 Response to Office Action (TSDR 8) (“[A] salt is a chemical compound consisting of an ionic assembly of cations and anions.”).

THE AMERICAN HERITAGE DICTIONARY OF MEDICINE (2018) defines “Salt” as, inter alia, “[a] chemical compound replacing all or part of the hydrogen ions of an acid with metal ions or electropositive radicals” and “[a]ny various mineral salts, such as magnesium sulfate, sodium sulfate, or potassium sodium tartrate, used as laxatives or cathartics.”<sup>4</sup>

WEBSTER’S NEW WORLD COLLEGE DICTIONARY (5th ed. 2014) defines “Zinc” as, inter alia, “a bluish-white, metallic chemical element, usually found in combination, used as a protective coating for iron, as a constituent in various alloys, as an electrode in electrical batteries, and in the form of salts, in medicines: symbol, Zn at no. 30.”<sup>5</sup>

Applicant’s “The Biogena Magazine” describes zinc as a “trace element.”<sup>6</sup>

The trace element zinc is among the best-known immune nutrients and one of the best protectors against oxidative stress at the cellular level. Involved in various metabolic processes, it promotes parts of both the innate and adaptive immune systems. It is indispensable for the formation of immune cells and messenger substances that control the functioning of the immune system.<sup>7</sup>

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<sup>4</sup> May 21, 2020 Office Action (TSDR 10) (YourDictionary.com).

The MERRIAM WEBSTER DICTIONARY (merriam-webster.com) (accessed March 4, 2022) defines “cathartic” as, inter alia, “a medicine that causes the bowels to be purged.”

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

<sup>5</sup> *Id.* at TSDR 12 (YourDictionary.com).

<sup>6</sup> The MERRIAM WEBSTER DICTIONARY (merriam-webster.com) (accessed March 4, 2022) defines “trace element” as “a chemical element present in minute quantities *especially*: a micronutrient (such as iodine, iron, and zinc) with an optimum daily intake of typically less than 100 milligrams a day.”

<sup>7</sup> January 29, 2021 Request for Reconsideration (TSDR 109).

Applicant's website (biogena-usa.com) advertises the sale of its 3-SALT ZINC supplement.<sup>8</sup> The website provides the following information about its 3-SALT ZINC supplement (emphasis added):

**3-Salt Zinc – What is it?**

3-Salt Zinc is a unique combination of three highly bioavailable organic zinc compounds (zinc picolinate, zinc bisglycinate and zinc malate). The careful selection of **zinc salts** was carried out by our in-house product development. In addition to the well-proven zinc picolinate and zinc bisglycinate, the **zinc salt malate acid** was also chosen. Well tolerated and correctly dosed, it is suitable for daily zinc supplementation for both young and old.

The low dose of 9 mg is also adequate for children and young people, who have a lower need to zinc than adults. The mineral is essential: The multi-talented zinc is part of more than 300 enzyme systems and therefore supports various functions of the immune system.<sup>9</sup>

III. Analysis

Applicant's mark 3-SALT ZINC used in connection with dietary supplements immediately informs consumers that Applicant's product consists of three zinc salts. As noted above, Applicant's websites informs consumers that its 3-SALT ZINC supplement is a "careful selection of zinc salts" specifically, zinc picolinate, zinc bisglycinate and zinc malate.<sup>10</sup> Applicant concedes that its 3-SALT ZINC supplement consists of three types of zinc salt.

This general term [salt] relates to the zinc supplements because it contains three salts, none of which are sodium chloride, but all of which are zinc salts, with zinc as the

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<sup>8</sup> May 21, 2020 Office Action (TSDR 17-20).

<sup>9</sup> *Id.* at TSDR 18.

<sup>10</sup> May 21, 2020 Office Action (TSDR 18).

cation (not a sodium cation) combined with an anion that is not chloride (there is no zinc chloride). In particular, Applicant's zinc supplements contains [sic] the zinc salts of zinc picolinate, zinc bisglycinate and zinc malate.<sup>11</sup>

Accordingly, a consumer interested in purchasing or taking a zinc supplement would know, without resorting to a multiple step reasoning process, that 3-ZINC SALT supplement consists of three types of zinc salt.

A term that describes an ingredient of the goods is merely descriptive. *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574 (Fed. Cir. 2015) (holding NOPALEA merely descriptive of dietary and nutritional supplements containing nopal juice); *In re Keebler Co.*, 479 F.2d 1405, 178 USPQ 155 (CCPA 1973) (holding RICH 'N CHIPS merely descriptive of chocolate chip cookies); *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (CCPA 1973) (holding CREME DE MENTHE merely descriptive of candy); *In re Entenmann's, Inc.*, 15 USPQ2d 1750 (TTAB 1990) (holding OATNUT merely descriptive of bread containing oats and hazelnuts); *Flowers Indus., Inc. v. Interstate Brands Corp.*, 5 USPQ 2d 1580 (TTAB 1987) (holding HONEY WHEAT merely descriptive of bread containing honey and wheat).

Applicant contends that its use of the term "salt" is not relevant.

Applicant notes that, the use of "salt" by Applicant, for example, on its website and in its literature, is not evidence of how the ordinary consumer would understand the term "salt" in connection with these goods – it is only evidence of how Applicant uses the term. Evidence of how consumers understand the term is provided by dictionary definitions, general media references, the Examining Attorney's own assertions in both Office Actions, and the lack of third party uses of "salt" for zinc supplements, as compared to

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<sup>11</sup> January 29, 2021 Request for Reconsideration (TSDR 16).

the evidence of use of the term for supplements that actually do contain salt in its primary sense of sodium chloride / table salt.<sup>12</sup>

There are three problems with Applicant's contention. First, we consider the mark in its entirety (i.e., 3-SALT ZINC). We do not focus on one term in a three-part mark. *See In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005) ("An inquiry into the public's understanding of a mark requires consideration of the mark as a whole."); *In re Am. Fertility Soc'y*, 51 USPQ2d 1832 at 1837 (the USPTO must consider the mark in its entirety because the mark, as whole, may be greater than the sum of its parts); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1515 (TTAB 2016) (must consider the mark as a whole). Thus, Applicant's argument that the average consumer for dietary supplements perceives the word "salt" as "sodium chloride" (i.e., the white crystal for seasoning and preserving food) improperly dissects the mark because the mark at issue is 3-SALT ZINC.<sup>13</sup> Thus, the proper inquiry is how consumers perceive 3-SALT ZINC.

Second, in determining how the relevant consuming public perceives Applicant's mark in connection with its identified goods, we may consider any competent source, including Applicant's own advertising material and explanatory text. *See In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017) (the USPTO may consider any competent evidence including advertising material); *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (Board

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<sup>12</sup> Applicant's Brief, pp. 11-12 (6 TTABVUE 12-13). *See also* January 29, 2021 Request for Reconsideration (TSDR 17) (same).

<sup>13</sup> Applicant's Brief, pp. 5-11) (6 TTABVUE 6-12).

appropriately reviewed applicant's website for context to understand the meaning of the mark); *Steelbuilding.com*, 75 USPQ2d at 1421 (examining applicant's website to determine the meaning of terms); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Any competent source suffices to show the relevant purchasing public's understanding of a contested term or phrase."). It is hard to imagine anything more relevant than Applicant's use of its mark for determining the commercial impression it is trying to engender.

Three, even if Applicant were the first or only user of a merely descriptive designation, that does not necessarily render a word or term incongruous or distinctive; as in this case, the evidence shows that 3-SALT ZINC is merely descriptive of the Applicant's dietary supplements containing 3 types of zinc salt. See *Fat Boys Water Sports*, 118 USPQ2d at 1514; *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012). see also *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (trademark law does not countenance someone obtaining "a complete monopoly on use of a descriptive term simply by grabbing it first.") (citation omitted).

A significant basis for Applicant's argument that 3-SALT ZINC is suggestive, rather than merely descriptive, is that the Examining Attorney defines "salt" as "sodium chloride" when Applicant's zinc supplements do not contain any sodium chloride.<sup>14</sup> According to Applicant, because the purchasing public, like the Examining Attorney is unaware of the technical meaning of the term "salt," they will perceive

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<sup>14</sup> Applicant's Brief, pp. 5-11 (6 TTABVUE 6-12).

“salt” as being “sodium chloride” even though there is no sodium chloride in the zinc supplements. Therefore, the purchasing public will have to exercise a multiple step reasoning process to decipher the meaning of 3-SALT ZINC.<sup>15</sup>

Even if the Examining Attorney mistakenly believes that Applicant’s zinc supplements are sodium chloride based, we do not need to find that the Examining Attorney’s rationale was correct to affirm the refusal to register, but rather may rely on a different rationale. *See In re AFG Indus. Inc.*, 17 USPQ2d 1162, 1163 (TTAB 1990) (“[W]e note that the Board reviews an Examining Attorney’s decision on appeal to determine if the refusal to register was correctly made. In doing so, the Board need not adopt the rationale of the Examining Attorney.”); *In re Avocet, Inc.*, 227 USPQ 566, 567 (TTAB 1985) (“[T]he Trademark Trial and Appeal Board, when exercising its appellate jurisdiction under Section 20 of the Lanham Act (15 USC § 1070), reviews the ‘decision’ of the Examining Attorney for its correctness and need not adopt the Examining Attorney’s rationale in every respect in order to affirm the decision of the Examining Attorney.”).

Likewise, even if the purchasing public mistakenly believes that Applicant’s 3-SALT ZINC supplements are sodium chloride based, the purchasers still perceive the mark 3-SALT ZINC directly conveying that the supplements consist of three zinc salts despite the fact that they may mistakenly believe that the zinc salts are chloride based.

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<sup>15</sup> Applicant’s Brief, pp. 8-9 (6 TTABVUE 9-10).

We find the mark 3-SALT ZINC for the dietary supplements in the description of goods to be merely descriptive.

**Decision:** We affirm the refusal to register Applicant's mark 3-SALT ZINC under Section 2(e)(1) of the Trademark Act.